Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

VICKI MEISNER, Individually and as personal representative of the Estate of Howard Gene Weatherly,

Petitioner,

v.

POTLATCH CORPORATION, A Delaware Corporation, and ROBERT HOUSE,

Respondents.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Because the Idaho Worker's Compensation law permitted no remedy for the death of her father, plaintiff filed a civil suit. The suit sought a civil remedy for the wrongful death damages of plaintiff and her two brothers. Their father was killed on the job. Their father was not married and the three surviving children were adults. In addition, part of their father's pension was forfeited because he had no spouse or minor child(ren) at the time of his death.

1

Is the Idaho Worker's Compensation law unconstitutional when a worker is negligently killed on the job and his family is not allowed a remedy unless the heirs are either a spouse and/or minor child(ren)?

2

Is a company/union pension plan provision void as to public policy or unconstitutional when the heirs receive nothing unless the heirs are a spouse and/or minor child(ren)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Vicki Meisner ("Meisner"), respectfully prays that a Writ of Certiorari issue to review the opinion of the Idaho Supreme Court entered in this proceeding on February 27, 1998, in order to address the issue of a party's right to a remedy and the loss of pension benefits.

OPINION BELOW

The opinion of the Idaho Supreme Court that gives rise to this petition is cited as *Meisner v. Potlatch Corporation*, ___ Idaho ___, ___ P.2d ___ (1998). The opinion is reprinted in Appendix I ("App. 1-11") in the form issued by the Idaho Supreme Court.

JURISDICTION

Meisner asks the Court to review the decision of the Idaho Supreme Court on the grounds the denial of a wrongful death claim is repugnant to the United States Constitution and the denial of some pension benefits is improper because of marital status and/or having minor child(ren). This Court has jurisdiction based upon 28 U.S.C. § 1257.

STATUTES AND CONSTITUTION INVOLVED IN THIS CASE

The Idaho Worker's Compensation law provides for remedies for on the job injuries. These claims are filed

with the Industrial Commission. The remedies are exclusive remedies. No remedy for an on-the-job death is provided where the decedent has no surviving spouse or minor child(ren). The Idaho Worker's Compensation law is covered in Idaho Code § 72-101 *et seq.* Since no remedy was provided to Meisner as an adult child and her two adult brothers, a civil wrongful death suit was filed in Clearwater County District Court.

The District Court decision Appendix III ("App. 14-17") held the District Court had no jurisdiction over an on-the-job death. The Supreme Court affirmed this holding. The result is Meisner has no remedy.

Meisner submits Amendment VII and XIV to the United States Constitution applies.

STATEMENT OF THE CASE

Howard Gene Weatherly worked for Respondent, Potlatch, Inc. ("Potlatch"), for twenty-eight (28) years. Potlatch is in the lumber and timber business. On July 29, 1994, Howard Gene Weatherly, at the age of fifty-five (55), was negligently killed while on the job at Potlatch's Jaype Mill near Pierce, Idaho by a co-worker, Respondent, Robert House ("House"). Potlatch was negligent on the basis of *respondeat superior* and it permitted an improper walkway.

Mr. House was operating a fork lift and attempted to lift two units of plywood at one time from the top of a stack of plywood, which was five units high. Mr. Weatherly was on the opposite side of the stack in a walkway.

The forklift forks pushed the top unit off the stack rather than picking it up. The top unit of plywood fell on Mr. Weatherly, killing him.

Mr. Weatherly was survived by three adult children and nine grandchildren. Mr. Weatherly was divorced so he had no spouse at the time of his death.

Meisner is one of the three adult children. She is the personal representative of her father's estate. She and her two brothers are Mr. Weatherly's heirs under Idaho law.

Meisner filed a wrongful death case in Idaho State District Court. The Idaho Worker's Compensation Act provides a remedy for a worker killed on the job if the heir is a spouse and/or minor child(ren). Mr. Weatherly's heirs are adult children so they had no remedy within the Idaho Worker's Compensation law.

Meisner also sought certain pension benefits which the employer refused to pay on the basis Mr. Weatherly was not survived by a spouse or minor child(ren).

REASONS FOR GRANTING THE WRIT

Wrongful Death Claim

The Idaho Court rationalized it would disrupt business to allow a civil remedy for the death of Howard Gene Weatherly. An employer in Idaho who has a worker killed on the job and who has no spouse and/or minor child(ren) pays the burial expense and a $10,000 fee to the State of Idaho Industrial Special Indemnity Account. No remedy is provided to the decedent's family if they are adult children.

Civil remedies were replaced by worker's compensation laws in the states starting in the early 1900's for on-the-job injuries. The current Idaho statement removing common law claims from the courts to an industrial scheme is found in Idaho Code § 72-201. It states as follows:

> **72-201. Declaration of police power.** – The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial conditions. The welfare of the state depends upon its industries and even more upon the welfare of its wageworkers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this law provided.

Two statements in the statute are important to note for this case. First the welfare of the state is more dependent upon the welfare of its wageworkers than its industries. (The Idaho Supreme Court decision in this case is repugnant in light of the statute when the opinion of the Idaho Supreme Court [App. 1] put industry above wageworkers). The second statement is at the heart of this

petition for certiorari. The statute says, " . . . sure and certain relief for injured workmen and *their families* and dependents is hereby provided . . . " Idaho Code § 72-201 (Emphasis added).

When reading Idaho Code § 72-201 Meisner and her two brothers are covered. The Idaho Supreme Court applied Idaho Code § 72-413 to the case, not Idaho Code § 72-201. Idaho Code § 72-413 reads in part as follows:

> **72-413. Income benefits for death.** – If death results from the accident or occupational disease within four (4) years from the date of the accident, or manifestation of the occupational disease, the employer shall pay to or for the benefit of the following classes of dependents' weekly income benefits . . .

Idaho Code § 72-413 requires dependency. See Appendix IV (App. 18-20). A conflict therefore exists between Idaho Code § 72-201 and § 72-413. Idaho Code § 72-413 omitted a remedy for a decedent's surviving family if no spouse and/or minor child(ren) survived. (Idaho Code § 72-413 covers some other persons who may qualify as dependents.) It is repugnant to declare police power over families then omit a remedy when all other citizens have either a wrongful death civil suit or a death case under worker's compensation.

The Idaho Supreme Court has steadfastly stated the provisions of the worker's compensation law must be liberally construed in favor of the worker.

> More specifically, we must liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the

> humane purpose for which the law was promulgated. *Sprague v. Caldwell Transp., Inc., 116 Idaho 720, 721, 779 P.2d 395, 396 (1989).* The purpose of the workers' compensation law is to provide sure and certain relief for injured workmen and their families and dependents. I.C. § 72-201.

Davaz v. Priest River Glass Co., 125 Idaho 333, 870 P.2d 1292 (1994). Meisner submits the worker's compensation law failed to cover her and her brothers as required under Idaho Code § 72-201 for "families" and therefore their civil lawsuit for wrongful death should be allowed to proceed.

The Idaho Supreme Court failed to follow its own precedent of relief for the worker's death. The result means the Weatherly family is denied a remedy. This is in violation of the United States Constitution. Meisner submits two Amendments apply. These are stated as follows:

> **AMENDMENT VII.** – In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

> **AMENDMENT XIV.** – § 1 [Citizenship – Due process of law – Equal protection.] – All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

United States Constitution Amendments VII and XIV.

An employer might become selective in who performs high risk jobs. A young single person with no children or an older worker who only has adult children and is divorced or whose spouse has died would cost the company very little in Idaho if a death occurred.

In this case, Potlatch violated OSHA rules and Mr. House was negligent. Yet the family has no remedy. This violates the United States Constitution. The remedy for Meisner is to ask this Court to overturn the Idaho Supreme Court case and Clearwater County District Court decision and allow her to proceed with her cause of action in District Court. A jury would decide the facts and award damages to the family if Meisner proved her cause of action.

The Idaho legislature, if they choose to, can change the law for future cases to provide a remedy in Idaho Worker's Compensation Act for families. Meisner's remedy for wrongful death is to allow her to proceed in the civil suit.

Pension Funds

Mr. Weatherly had pension benefits as an employee of Potlatch. One of the benefits paid by the employer provided a pension fund. This pension fund allowed a surviving spouse or minor child(ren) to receive the pension fund balance. The Idaho Supreme Court took the approach since this arose from a union contract between

the union and employer, the Court could do nothing. (If a person enters into a private contract to murder someone, the act does not become legal because a private contract existed.)

Meisner submits this Court could remedy this problem by holding the contract provision in question violates public policy on the basis a contract cannot discriminate on the basis of marital status. Just because the contract falls under ERISA (29 U.S.C. §§ 1001-1461) does not mean discriminatory conduct is allowed. It would be a constitutional violation of equal protection to allow a married person different employment rights and benefits from a non-married person. ERISA was not intended to allow discrimination. A union/company contract cannot improperly discriminate.

CONCLUSION

Idaho Code § 72-211 states as follows:

> **72-211. Exclusiveness of employee's remedy.** – Subject to the provisions of section 72-223, the rights and remedies herein granted to an employee on account of an injury or occupational disease for which he is entitled to compensation under this law shall exclude all other rights and remedies of the employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or disease.

Mr. Weatherly's family has no right or remedies granted under the worker's compensation laws. Idaho Code § 72-211 says the rights and remedies of Mr. Weatherly's

family are traded if they can make a claim under the worker's compensation law. They have no rights or remedies under the worker's compensation laws. Therefore, the worker's compensation laws do not apply to them. It is unconstitutional to apply the worker's compensation law as the Idaho Supreme Court did.

Public policy is violated when a contract allows discrimination on the basis of marriage. Mr. Weatherly's family should be entitled to the pension benefits Potlatch paid to his account. Potlatch benefited by denying these benefits to the family.

The petition for writ of certiorari should be granted.

Respectfully submitted this 27th day of May, 1998.

AHERIN, RICE & ANEGON

DARREL W. AHERIN
Attorney for Plaintiff

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 22974

VICKI MEISNER, Individually and as personal representative of the Estate of Howard Gene Weatherly,	**1998 Opinion No. 17**
Plaintiff-Appellant,	**Boise, October, 1997 Term**
v.	**Filed: February 27, 1998**
POTLATCH CORPORATION, A Delaware Corporation, and ROBERT HOUSE,	**Frederick C. Lyon, Clerk**
Defendants-Respondents.	

Appeal from the District Court of the Second Judicial District of the State of Idaho, Clearwater County. Hon. George Reinhardt, III, District Judge.

Appeal from the district court's grant of summary judgment in favor of the defendants. *Affirmed.*

Aherin, Rice & Anegon, Lewiston; McCann Law Office, Lewiston, for Appellant. Darrel W. Aherin argued.

Clements, Brown & McNichols, Lewiston, for Respondent. Michael E. McNichols argued.

TROUT, Chief Justice.

This is an appeal of a dismissal for lack of subject matter jurisdiction of negligence and wrongful death claims arising from the death of a worker covered by

worker's compensation. In addition, this appeal determines whether Idaho's worker's compensation statutes which deny death benefits to independent adult children of deceased workers, and private pension plans paying pre-retirement death benefits only to the spouses of deceased workers, violate constitutional equal protection rights.

I.

BACKGROUND

On the morning of July 29, 1994, Howard Weatherly, appellant Vicki Meisner's father, was killed while working at Potlatch's Jaype Mill when two bundles of plywood fell on him. The bundles fell on Weatherly as Robert House was attempting to lift them off a stack using a forklift.

In compliance with Idaho's worker's compensation statutes, Potlatch's surety paid Weatherly's estate for burial and ambulance expenses and those are not at issue here. The worker's compensation statutes also provide a death benefit for named, dependent family members of workers killed on the job. I.C. § 72-413. At his death, Weatherly was unmarried and survived by three adult children and nine grandchildren, none of whom were dependent on him for support. Because none of Weatherly's heirs was eligible to receive a death benefit under § 72-413, Potlatch's surety deposited $10,000.00 in the State's Industrial Special Indemnity Account pursuant to I.C. § 72-420.

As part of his employment benefits, Weatherly was provided with a life insurance policy and two retirement plans. The proceeds of the life insurance policy were paid to Weatherly's son, Dan Weatherly, the designated beneficiary. Weatherly also participated in a 401(k) plan in which he could purchase shares of Potlatch stock. The value of the stock in Weatherly's 401(k) account was paid to Meisner and Dan Weatherly. The remaining pension plan was the result of a collective bargaining agreement between Potlatch and the International Woodworkers of America of which Weatherly was a member. Potlatch made all contributions to this plan. Under the terms of the plan, no death benefits were payable if an unmarried participant died prior to retirement.

Meisner filed a complaint, individually and as the personal representative of her father's estate, in Clearwater County district court against Potlatch and House alleging negligence and wrongful death. In addition, the complaint sought a declaratory judgment on the constitutionality of I.C. § 72-413 and the Potlatch retirement plan. Specifically, Meisner contended that § 72-413 violated the equal protection clauses of the United States and Idaho Constitutions by discriminating on the basis of dependancy. Meisner further contended the Potlatch pension plan denied equal protection on the basis of marital status. Potlatch and House moved for summary judgment under I.R.C.P. 56(b) and moved to dismiss pursuant to I.R.C.P. 12(b)(1) and 12(b)(6). Following a hearing, the district court dismissed Meisner's negligence and wrongful death claims on the basis of lack of subject matter jurisdiction. The district court also held that the worker's compensation provisions in question were constitutional.

Finally, the district court granted summary judgment for Potlatch as to the retirement benefits based upon preemption by the Employer Retirement Income and Security Act (ERISA) and based upon the fact that the retirement plan was a private contract whose terms did not provide for benefits to be paid to Meisner. Meisner appealed.

II.

STANDARD OF REVIEW

> When faced with an appeal from summary judgment, this Court must determine whether the pleadings, depositions, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. The non-moving party is to be given the benefit of all favorable inferences which reasonably might be drawn from the evidence, and all doubts are to be resolved against the moving party. The motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions.

Farmers Nat'l. Bank v. Shirey, 126 Idaho 63, 67-68, 878 P.2d 762, 766-67 (1994) (citations omitted).

Whether a court has properly dismissed a case for lack of jurisdiction pursuant to I.R.C.P. 12(b)(1) is a question of law over which this Court exercises free review. *Downey Chiropractic Clinic v. Nampa Restaurant Corp.*, 127 Idaho 283, 285, 900 P.2d 191, 193 (1995). Constitutional issues are purely questions of law over which this Court

exercises free review. *Harris v. State Dept. of Health & Welfare*, 123 Idaho 295, 297, 847 P.2d 1156, 1158 (1992).

III.

NEGLIGENCE AND WRONGFUL DEATH CLAIMS

Meisner challenges the district court's dismissal of her negligence and wrongful death claims for lack of jurisdiction. The district court based its decision on prior decisions of this Court that the worker's compensation statutes provide the exclusive remedy for workers injured on the job. *See, Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994). Idaho Code sections 72-201 and 72-211 vest exclusive jurisdiction for claims for injuries arising out of and sustained during the course of employment in the Industrial Commission. *Henderson v. State*, 110 Idaho 308, 715 P.2d 978 (1986). This includes claims brought by the survivors of workers killed on the job. *Stample v. Idaho Power Co.*, 92 Idaho 763, 450 P.2d 610 (1969). We therefore find no error in the district court's dismissal of the negligence and wrongful death claims on the basis of lack of jurisdiction.

IV.

CONSTITUTIONAL CLAIMS

A. Equal Protection Claim

Meisner argues that I.C. § 72-413 violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and art. I, §§ 1 and 2 of the Idaho Constitution because, while dependent children of

deceased workers are provided a benefit under the statute, independent adult children are left without a remedy. We note at the outset that "[i]t is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990) (citations omitted). Thus, the burden of overcoming the presumption of validity of the statute rests on Meisner. *Id.*

Equal protection claims require a two-step analysis. The reviewing court must first, identify the classification which is being challenged and second, determine the standard under which the classification will be reviewed. *Tarbox v. Tax Comm'n.*, 107 Idaho 957, 959, 695 P.2d 342, 344 (1984). At oral argument, counsel for both sides agreed that in this case the classification was based on dependancy; that is, children of a worker covered by the worker's compensation act who are dependent, as opposed to children of a covered worker who are not dependent.

For equal protection challenges to statutes based on the Fourteenth Amendment, three levels of scrutiny are used. These are strict scrutiny, intermediate scrutiny and the rational basis tests. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42, 105 S. Ct. 3249, 3254-55 (1985). The analysis of equal protection claims under the Idaho Constitution is very similar. "Three standards of equal protection analysis have been recognized in Idaho: strict scrutiny, means-focus, and rational basis." *Leliefeld v. Johnson*, 104 Idaho 357, 373, 659 P.2d 111, 127 (1983)

(citation omitted). Meisner concedes that strict scrutiny is not appropriate since neither a fundamental right nor a suspect class is involved. Instead, Meisner argues that the intermediate scrutiny/means-focus standard should be applied, while Potlatch argues that the rational basis test is appropriate.

To survive analysis under the intermediate scrutiny test, a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 457 (1976). The United States Supreme Court, however, has applied intermediate scrutiny only to classifications involving either gender (*Craig*) or illegitimacy (*Mills v. Habulutzel*, 456 U.S. 91, 102 S. Ct. 1549 (1982)). Since the classification at issue here involves neither gender nor illegitimacy, intermediate scrutiny is not the proper standard for analysis under the Fourteenth Amendment.

The means-focus test, while similar to the intermediate scrutiny test, has not been limited by Idaho courts to cases involving gender and illegitimacy; rather it has been applied to cases "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute. . . . " *Jones v. State Bd. of Med.*, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976). This Court, however, "has limited review under [the means-focus] standard to statutes of a blatantly discriminatory nature." *Tarbox*, 107 Idaho at 960, 695 P.2d at 345 (1984). Economic and social welfare legislation, such as the worker's compensation statutes, are not subject to the

means-focus test unless they create a suspect or invidiously discriminatory classification or involve a fundamental right. *Rhodes v. Industrial Comm'n.*, 125 Idaho 139, 142, 868 P.2d 467, 470 (1993). Because we find that the statute in question does not involve a fundamental right and that a classification based on dependancy is not invidiously discriminatory, we decline to apply the means-focus test. Thus, in examining this issue under either the United States or Idaho constitutions, we apply a rational basis analysis.

Under either the Fourteenth Amendment or the Idaho Constitution, a classification will survive rational basis analysis if the classification is rationally related to a legitimate governmental purpose. *Lyng v. International Union, U.A.W.*, 485 U.S. 360, 108 S. Ct. 1184 (1988); *Idaho Schools for Equal Educ. v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993). "Under the 'rational basis test,' a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it." *Bint v. Creative Forest Prod.*, 108 Idaho 116, 120, 697 P.2d 818, 822 (1985) (citations omitted). Meisner argues that because the statute does not provide for the independent children of deceased workers, it is not rationally related to the purpose of providing "sure and certain relief for injured workmen and their families and dependents." I.C. § 72-201.

Worker's compensation statutes must be considered in the context of the entire act. *Arneson v. Robinson*, 59 Idaho 223, 82 P.2d 249 (1938). The purpose of the worker's compensation act is not only to provide relief for workers but also to protect industry by providing a limit on liability. By limiting the class of people who can

collect benefits, § 72-413 arguably protects Idaho industry by providing some degree of certainty in terms of liability. In addition, when considered as a whole, it is clear that worker's compensation statutes are designed to compensate on the basis of need. Because the intent of the statutes is to provide for loss of monetary support, we find it both rational and reasonable for the legislature to limit benefits to those individuals who were truly dependent on the deceased worker. We, therefore, find no error in the district court's holding that I.C. § 72-413 does not violate equal protection.

B. Article III, Section 19

In addition to her equal protection challenge, Meisner contends that I.C. § 72-413 violates art. III, § 19 of the Idaho Constitution which prohibits the passage of special laws. Potlatch argues that the Court should not consider this issue since it was not specifically raised before the district court. The record before us shows that in district court Meisner argued only that I.C. § 72-413 violated equal protection and not that it was a special law in violation of art. III, § 19 of the Idaho Constitution. "This Court will not consider issues that are raised for the first time on appeal." *Henderson v. Smith*, 128 Idaho 444, 451, 915 P.2d 6, 13 (1996) (citation omitted). We therefore decline to address Meisner's argument that I.C. § 72-413 is a special law.

V.

PENSION PLAN

We begin by noting that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, precludes courts from entertaining state law claims arising from employee benefit plans. *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 99 (9th Cir. 1994). "ERISA contains one of the broadest preemption clauses ever enacted by Congress." *Id.* (citations omitted). Since Meisner is neither a participant nor a beneficiary of the pension plan, she has no remedy under ERISA. Meisner attempts to circumvent the ERISA preemption by claiming that the pension plan violates the Fourteenth Amendment by discriminating on the basis of marital status.

It is well settled that a violation of the Fourteenth Amendment requires state action. *The Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18 (1883). Citing *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948), Meisner argues that the state action requirement was met by the district court's grant of summary judgment in favor of Potlatch. Under Meisner's theory, any party to a private contract could invoke the Fourteenth Amendment simply by filing an action in state court. We decline to give *Shelley* the broad reading that Meisner urges upon us. Even if *Shelley* applied, it is clearly distinguishable. *Shelley* involved the issuance of an injunction to force the parties to abide by the terms of a racially restrictive covenant, not a grant of summary judgment. In addition, *Shelley* involved a classification based on race not marital status.

The pension plan in question was clearly a private contract between Potlatch and Meisner's father acting

through his agent, the International Woodworkers of America. The grant of summary judgment by the district court did not constitute state action sufficient to support a claim for violation of the Fourteenth Amendment. Therefore, the district court did not err in granting summary judgment to Potlatch on the pension plan claim.

V.

ATTORNEY FEES

On appeal, Potlatch seeks an award of attorney fees. The only argument on this issue was a single conclusory sentence in the "Conclusion" section of Potlatch's brief. This Court will not consider issues cited on appeal that are not supported by propositions of law, authority or argument, *Saint Alphonsus Reg'l. Med. Ctr. v. Bannon*, 128 Idaho 41, 910 P.2d 155 (1995), thus we decline to consider the issue of attorney fees.

VI.

CONCLUSION

For the reasons stated above, the decision of the district court is affirmed. Costs on appeal to respondent.

Justices JOHNSON, SILAK, SCHROEDER and WALTERS, **CONCUR**.

APPENDIX II

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

VICKI MEISNER, individually, and as Personal Representative of the Estate of HOWARD GENE WEATHERLY, Plaintiffs, vs. POTLATCH CORPORATION, a Delaware corporation, and ROBERT HOUSE, Defendants.	Case No: CV 95-256 JUDGMENT (Filed April 2, 1996)

The Court having issued its MEMORANDUM OPINION AND ORDER determining that the MOTION TO DISMISS and MOTION FOR SUMMARY JUDGMENT of defendants should be granted,

IT IS ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff is dismissed, with prejudice.

Defendants are awarded their costs in the sum of 90^{00}.

DATED April 1, 1996.

/s/ George R. Reinhardt, III
GEORGE R. REINHARDT, III
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 1996, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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CLERK OF THE DISTRICT COURT

By: /s/ Sue K. Summerton
Deputy Clerk

APPENDIX III

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

VICKI MEISNER, individually, and as Personal Representative of the Estate of HOWARD GENE WEATHERLY, Plaintiffs, vs. POTLATCH CORPORATION, a Delaware corporation, and ROBERT HOUSE, Defendants.	Case #CV95-256 MEMORANDUM OPINION AND ORDER (Filed March 15, 1996)

Howard Weatherly and Robert House were employees of Potlatch Corporation. On July 29, 1994, Weatherly and House were working at Potlatch's Jaype plant when a load of plywood fell from Houses forklift onto Weatherly. Weatherly was killed. Both Weatherly and House were acting within the course and scope of their employment when the accident occurred.

Weatherly was unmarried when he died and he had no dependents. Consequently, no worker's compensation income death benefits were paid under Idaho Code Section 72-413. However, Potlatch's worker's compensation surety was required to and did pay for Weatherly's ambulance and funeral expenses. The surety also paid

$10,000 to the State of Idaho under Idaho Code Section 72-420, which requires such a payment when no income death benefits are payable under Idaho Code Section 72-413. (Id.).

Weatherly was a participant in Potlatch Corporation's Retirement Plan for Hourly Employees In The Logging and Lumber Divisons [sic] ("Retirement Plan"). The Retirement Plan is funded entirely by contributions from Potlatch. Under the terms of the Retirement Plan, no money is payable to Weatherly's heirs because Weatherly was unmarried and had not retired before he died.

Weatherly was also a participant in a 401(k) Plan sponsored by Potlatch. Both Weatherly and Potlatch contributed to the 401(k) Plan, and Weatherly's beneficiaries received the full value of the 401(k) Plan following his death.

Additionally, Weatherly was insured under a group life insurance plan obtained by The Nelson Trust, a union-management trust which is funded by contributions from Potlatch. The plan's insurer paid $30,000 in life and accidental death benefits to Dan Weatherly, Howard Gene Weatherly's designated beneficiary.

Vicki Meisner, individually and as personal representative of the estate of Howard Weatherly, sued Potlatch and House. The Complaint asserts a wrongful death claim against House and Potlatch and asserts a claim against Potlatch for benefits from the Retirement Plan.

Potlatch and House have filed a Motion to Dismiss and for Summary Judgment. The motion seeks dismissal under Rule 12(b)(1) and 12(b)(6) – i.e., lack of subject

matter jurisdiction and failure to state a claim. The motion also seeks Summary Judgment under Rule 56(b) on the grounds that no genuine issue of material fact exists and that defendants are entitled to judgment as a matter of law.

The Complaint alleges that Mr. Weatherly was killed while working for Potlatch due to the negligence of a co-employee and Potlatch. The provisions of Idaho Code Section 72-201, 72-209, 72-211, 72-707, and 72-733 lead this Court to conclude that the District Courts of the State of Idaho lack subject matter jurisdiction over this action.

The Plaintiff complains that this action should not be barred because no death benefits were paid under the provisions of Idaho Code Section 72-413. However, the surety did pay other benefits under the provisions of Idaho Code Section 72-413. Furthermore, Plaintiffs contention that the absence of death benefits extinguishes the wrongful death bar was rejected in *Stample vs. Idaho Power Company*, 92 Idaho 763.

Plaintiff additionally contends that the wrongful death bar violates equal protection guarantees. It is the opinion of this Court that the workman's compensation provisions in question are rationally related to a legitimate legislative goal and thus pass constitutional muster.

The Plaintiff also seeks benefits under decedent's Retirement Plan. The Retirement Plan is governed under the Employer Retirement Income and Security Act ("ERISA"). The Plaintiff in this action is neither a "participant" nor a "beneficiary" and thus has no right to pursue benefits under ERISA. Furthermore, the Retirement

Plan in question is a contract and the terms of the contract to [sic] not provide for payment to the plaintiff.

Based upon the foregoing, Defendant's Motion to Dismiss the wrongful death claim is granted because this Court lacks jurisdiction over the same. Furthermore, Plaintiff's claim for retirement benefits is dismissed-because [sic] there are no genuine issues of material fact concerning Potlatch's motion for summary judgment and thus Potlatch is entitled to judgment as a matter of law.

Dated this 15th day of March, 1996.

/s/ George Reinhardt
GEORGE REINHARDT
District Judge

I, the undersigned Deputy Clerk, do hereby certify that I mailed a copy of the foregoing document to the following on 3/15/96:

Darrel W. Aherin, Attorney at Law, PO Drawer 698, Lewiston, ID 83501

Michael E. McNichols, Attorney at Law, PO Box 1510, Lewiston, ID 83501

ROSE E GEHRING, CLERK

By: /s/ Starla Allen
Starla Allen
Deputy Clerk

APPENDIX IV

72-413. Income benefits for death.

If death results from the accident or occupational disease within four (4) years from the date of the accident, or manifestation of the occupational disease, the employer shall pay to or for the benefit of the following particular classes of dependents' weekly income benefits equal to the following percentages of the average weekly state wage as defined in section 72-409, Idaho Code. The benefits payable hereunder shall be subject to annual adjustment as provided in section 72-409(2), Idaho Code. The annual adjustment provided herein shall not apply to benefits for an injury or occupational disease resulting in death if the accident causing the injury or the manifestation of the occupational disease occurred prior to July 1, 1991.

(1) To a dependent widow or widower, if there be no dependent children, forty-five per cent (45%).

(2) To a dependent widow or widower, if there be dependent children, an additional five per cent (5%) of the average weekly state wage for each dependent child to and including a total of three (3). Such compensation to the widow or widower shall be for the use and benefit of the widow or widower and of the dependent children and the commission may from time to time apportion such compensation between them in such a way as it deems best.

(3) If there be no dependent widow or widower, but a dependent child or children, thirty per cent (30%) of the average weekly state wage for one (1) child and ten per

cent (10%) for each additional child to and including a total of three (3), to a maximum not to exceed sixty per cent (60%) of the average weekly state wage, to be divided equally among such children.

(4) To the parents, if one (1) be wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, twenty-five per cent (25%) of the average weekly state wage; if both are wholly dependent, twenty per cent (20%) of the average weekly state wage to each; if one (1) be or both are partly dependent, a proportionate amount in the discretion of the commission.

The above percentages shall be paid if there be no dependent widow, widower or child. If there be a widow, widower or child, there shall be paid so much of the above percentages as, when added to the total percentage payable to the widow, widower and children, will not exceed a total of sixty per cent (60%) of the average state weekly wage.

(5) To the brothers, sisters, grandparents and grandchildren, if one (1) be wholly dependent upon the deceased employee at the time of his death, twenty per cent (20%) of the average state weekly wage to such dependents; if more than one be wholly dependent, thirty per cent (30%) of the average state weekly wage, divided among such dependents, share and share alike. If there be no one (1) of them wholly dependent, but one (1) or more partially dependent, ten per cent (10%) of the average state weekly wage divided among such dependents, share and share alike.

The above percentages shall be paid if there be no dependent widow, widower, child or parent. If there be a dependent widow, widower, child or parent, there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower, children and dependent parents, will not exceed a total of sixty per cent (60%) of the average weekly state wage.

Payments made for and on behalf of a dependent child or children shall be made to such child's or children's natural or adoptive surviving parent for the use and benefit of the child or children, if such child or children reside with such parent, notwithstanding the remarriage of such parent; provided, however, if the care and the custody of such child or children has been awarded by a court of competent jurisdiction of this state or any other state to a person or persons other than the child's or children's natural or adoptive parent, then such payments shall be made to that person or those persons so awarded care and custody for the use and benefit of the child or children. Whenever the commission deems it necessary, it may direct any payments made hereunder to be made under such terms and conditions as it deems necessary.

U.S.
FILED
JUN 26
OFFICE OF THE CLERK

No. 97-1923

In The

Supreme Court of the United States

October Term, 1997

VICKI MEISNER, Individually and as personal representative of the Estate of Howard Gene Weatherly,

Petitioner,

vs.

POTLATCH CORPORATION, A Delaware Corporation, and ROBERT HOUSE,

Respondents.

On Petition for Writ of Certiorari to the Idaho Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's father died in a work-related accident near Pierce, Idaho while working for Potlatch Corporation. Petitioner, the decedent's adult daughter, received no worker's compensation death benefits because she was not economically dependent on her father. No benefits were payable from Potlatch's Retirement Plan because Petitioner's father died before he retired and did not leave a surviving spouse.

Petitioner contends that Idaho's Worker's Compensation Act violates the Equal Protection Clause by discriminating based on dependency and that the Retirement Plan violates the Equal Protection Clause by discriminating based on marital status.

1.

Does Idaho's Worker's Compensation Act violate the Equal Protection Clause by discriminating on the basis of dependency?

2.

Does the Retirement Plan violate the Equal Protection Clause by discriminating on the basis of marital status?

STATEMENT PURSUANT TO RULE 29.6

Potlatch Corporation has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Howard Weatherly and Robert House were employees of Potlatch Corporation ("Potlatch"). On July 29, 1994, Mr. Weatherly and Mr. House were working for Potlatch at a plywood mill near Pierce, Idaho when a load of plywood fell from Mr. House's forklift onto Mr. Weatherly. Mr. Weatherly was killed.

Idaho's Worker's Compensation Act requires employers to pay the medical and funeral expenses of workers who die in work-related accidents. Idaho Code §§ 72-432(1) and 72-436. The Act also requires employers to make payments — known as "death benefits" — to the worker's spouse and dependents. Idaho Code § 72-413. If a worker dies without a spouse or dependents, the employer must pay $10,000 to the State's Industrial Special Indemnity Account. Idaho Code § 72-420.

Potlatch's worker's compensation surety paid Mr. Weatherly's medical and funeral expenses. However, no death benefits were payable because Mr. Weatherly died unmarried and without dependents. Potlatch's surety did make the required $10,000 payment to the Industrial Special Indemnity Account.

Mr. Weatherly was a participant in a 401(k) Plan and in a Retirement Plan maintained pursuant to a collective bargaining agreement between Potlatch and Mr. Weatherly's union, the International Woodworkers of America. Both Mr. Weatherly and Potlatch contributed to the 401(k) plan, but only Potlatch contributed to the Retirement Plan. After Mr. Weatherly died, the full value of the 401(k) plan was paid to Mr. Weatherly's heirs. No benefits were payable from the Retirement Plan because Mr. Weatherly died before he retired and did not leave a surviving spouse.

Petitioner, one of Mr. Weatherly's three adult children, filed a wrongful death action against Potlatch and Mr. House. Petitioner's Complaint also included a claim for Retirement Plan benefits.

In Idaho, as in most states, civil lawsuits against a worker's employer and co-employees for work-related injuries and deaths are barred. Idaho Code § 72-211. Consequently, Potlatch and Mr. House moved for summary judgment on Petitioner's wrongful death claim.

As mentioned, no benefits are payable from the Retirement Plan when a participant dies before he retires and does not leave a surviving spouse. Additionally, Petitioner is precluded by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, from pursuing benefits from the Plan because she is neither a "participant" nor a "beneficiary" of the Plan. For those reasons, Potlatch also moved for summary judgment on the Retirement Plan claim.

In response, Petitioner contended that the Worker's Compensation Act's bar to her civil action is unenforceable because the death benefits statute — Idaho Code § 72-413 — violates the Equal Protection Clause by discriminating on the basis of dependency. Petitioner also contended that the Retirement Plan violates the Equal Protection Clause by discriminating on the basis of marital status. The trial court rejected Petitioner's contentions and granted the motion for summary judgment.

Petitioner appealed to the Idaho Supreme Court, where she once again raised her equal protection claims. The Idaho Supreme Court concluded that Idaho Code § 72-413 does not violate the Equal Protection Clause because the dependency-based distinction it draws is rationally related to a legitimate

governmental purpose. *Meisner v. Potlatch Corp.*, __ Idaho __, 954 P.2d 676, 680 (1998). The Court concluded that the Equal Protection Clause does not apply to the Retirement Plan because the Plan does not involve "state action." 954 P.2d at 681.

Petitioner filed a timely Petition for a Writ of Certiorari with this Court. Petitioner asks this Court to consider her Equal Protection Clause challenges to Idaho Code § 72-413 and to the Retirement Plan. Petitioner also claims — for the first time — that Idaho's Worker's Compensation Act violates her Seventh Amendment right to a trial by jury.

REASONS FOR DENYING THE WRIT

I.

IDAHO CODE SECTION 72-413 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Idaho Code § 72-413 provides that weekly income benefits in specified amounts are to be paid to the spouse and dependents of workers who die as a consequence of work-related accidents or diseases. Dependent children (as well as dependent brothers, sisters, grandparents and grandchildren) are entitled to benefits. Independent children, however, are not entitled to benefits. Petitioner contends that Idaho Code § 72-413's distinction between dependent and independent children violates the Equal Protection Clause of the Fourteenth Amendment.

Equal Protection Clause challenges to statutes are subject to one of three levels of scrutiny: (1) strict scrutiny; (2) intermediate scrutiny; or (3) rational basis scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-442 (1985). Strict scrutiny applies to classifications based on race or national origin and to classifications affecting fundamental

rights. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Intermediate scrutiny applies to classifications based on gender and illegitimacy. *Craig v. Boren*, 429 U.S. 190, 197 (1976); and *Mills v. Habulutzel*, 456 U.S. 91, 98 (1982). Rational basis scrutiny applies to classifications which neither burden a fundamental right nor target a suspect class. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Idaho Code § 72-413's dependency-based classification is not based on race, national origin, legitimacy or gender. Furthermore, there is no "fundamental right" to receive monetary payments following the death of a parent. Idaho Code § 72-413 is, therefore, subject to rational basis scrutiny.

A classification will withstand rational basis scrutiny "so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631; and *Lyng v. International Union, UAW*, 485 U.S. 360, 370 (1988). Idaho Code § 72-413 is a part of Idaho's Worker's Compensation Act. The goal of the Act is to provide sure and certain benefits to workers and their families regardless of fault while at the same time protecting Idaho's industry by creating limited liability. Idaho Code § 72-201 and *Stample v. Idaho Power Company*, 92 Idaho 763, 450 P.2d 610 (1969). Those goals are clearly legitimate.

The classification created by Idaho Code § 72-413 is rationally related to those legitimate goals: dependent children receive benefits regardless of fault, but in order to keep liability limited, independent children are not entitled to benefits.

Furthermore, as pointed out by the Idaho Supreme Court, the purpose of the Worker's Compensation Act is to provide for loss of monetary support. *Meisner*, 954 P.2d at 680. It was therefore both rational and reasonable for the Idaho legislature to limit death benefits to those individuals who were dependent

on the deceased worker. It is rational and reasonable to discriminate based on need.

This Court has not addressed the specific issue presented by this case. Many state courts, however, have held that statutes which limit the payment of death benefits in a manner similar to Idaho Code § 72-413 do not violate the Equal Protection Clause. *Riley v. National Mills, Inc.*, 19 Kan. App. 2d 541, 873 P.2d 214 (1994); *Smith v. Gortman*, 261 Ga. 206, 403 S.E. 2d 41 (1991); *Yarchak v. Munford, Inc.*, 570 So. 2d 648 (Ala. 1990), *cert. denied*, 500 U.S. 942; *Maderazo v. Archem Co.*, 788 S.W. 2d 395 (Tex. App. 1990); *Estate of Coates v. Pacific Engineering*, 71 Haw. 358, 791 P.2d 1257 (1990); *Hughes v. Decator General Hospital*, 514 So. 2d 935 (Ala. 1987); *Nosser v. Natchez Gitney Jungle, Inc.*, 511 So. 2d 141 (Miss. 1987); *Taylor v. Southeast-Harrison Western Corporation*, 694 P.2d 1160 (Ak. 1985); *Sanchez v. M.M. Sundt Construction Co.*, 103 N.M. 294, 706 P.2d 158 (Ct. App. 1985); *Barnes v. Double Seal Glass Company, Inc.*, 129 Mich. App. 66, 341 N.W. 2d 812 (1983); *Flynn v. Devore*, 373 So. 2d 580 (La. App. 1979); *Branch v. Aetna Casualty and Surety Co.*, 370 So. 2d 1270 (La. App. 1979); *Slagle v. Reynolds Metal Co.*, 344 So. 2d 1216 (Ala. 1977); *West v. Zeibell*, 87 Wash.2d 198, 550 P.2d 522 (1976); *Mullarkey v. Florida Feed Mills, Inc.*, 268 So. 2d 363 (1972); *Leech v. Georgia Pacific Corp.*, 259 Or. 161, 485 P.2d 1195 (1971).

Additionally, this Court held that it was not a violation of the Equal Protection Clause for the Social Security Act to authorize payment of survivor's benefits to a widowed spouse who remarried after age sixty, but not to a similarly situated divorced widowed spouse. *Bowen v. Owens*, 476 U.S. 340 (1986). This Court held that it was rational for Congress to treat the two groups differently based on the assumption that divorced widowed spouses are generally less dependent on the

resources of their former spouses than are widows and widowers. 476 U.S. at 349. This Court thus implicitly acknowledged the obvious — *i.e.*, that it is rational to discriminate based on dependency.

In short, Idaho Code § 72-413's dependency-based classification is rationally related to a legitimate end, and the statute therefore does not violate the Equal Protection Clause.

II.

PETITIONER'S WRONGFUL DEATH ACTION IS BARRED EVEN IF IDAHO CODE SECTION 72-413 VIOLATES THE EQUAL PROTECTION CLAUSE.

As mentioned, Idaho Code § 72-211 bars all civil lawsuits against a worker's employer and co-employees for work-related injuries or deaths. Petitioner, however, claims that the bar is unenforceable because Idaho Code § 72-413 violates the Equal Protection Clause.

The goal of the Equal Protection Clause is equality. Petitioner, however, does not seek equality; instead, she seeks preferential treatment. Petitioner is not asking that she be granted the same benefits as dependent children — i.e., worker's compensation death benefits. Rather, she is asking for something dependent children do not have: the right to pursue a civil lawsuit.

If Idaho Code § 72-413 unconstitutionally discriminates against independent children, the remedy should be worker's compensation death benefits rather than a nullification of Idaho Code Section 72-211's bar. The Equal Protection Clause should not be used as a lever for obtaining preferential treatment.

III.

THE SEVENTH AMENDMENT ISSUE SHOULD NOT BE CONSIDERED.

Petitioner's claim that Idaho's Worker's Compensation Act violates her Seventh Amendment right to a jury trial was not raised in the Idaho courts. The claim was raised for the first time in Petitioner's Petition for Writ of Certiorari. This Court does not decide federal constitutional issues raised for the first time on review of state court decisions. *Cardinal v. Louisiana*, 394 U.S. 437, 438 (1969).

IV.

THE SEVENTH AMENDMENT IS INAPPLICABLE.

Petitioner's Complaint was filed in state court, and Idaho's Worker's Compensation Act and Petitioner's wrongful death claim arise solely from the statutes and common law of Idaho. The Seventh Amendment does not apply to state law claims filed in state court. *Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1875).

V.

PETITIONER LACKS STANDING TO PURSUE THE RETIREMENT PLAN CLAIM.

The Retirement Plan falls within the definition of an "employee benefit plan" and is therefore governed by the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. §§ 1002(2) and (3) and § 1003(1). ERISA authorizes benefit plan "participants" and "beneficiaries" to bring actions for plan benefits. 29 U.S.C. § 1132(a)(1). Petitioner does not

fall within the definition of either a "participant" or a "beneficiary" because she is neither an employee nor a designated beneficiary of an employee. 29 U.S.C. §§ 1002(7) and (8). Petitioner, therefore, does not have the right to bring an action for Plan benefits.

VI.

THE EQUAL PROTECTION CLAUSE DOES NOT APPLY TO THE RETIREMENT PLAN.

Petitioner argues that the Retirement Plan's distinction between married and unmarried workers violates the Equal Protection Clause of the Fourteenth Amendment. However, a violation of the Fourteenth Amendment requires state action. *The Civil Rights Cases*, 109 U.S. 3 (1883). Plainly, there is no state action involved in the Retirement Plan. It is simply a matter of private contract between Potlatch, the International Woodworkers of America and Mr. Weatherly.

Petitioner reliance on *Shelley v. Kraemer*, 334 U.S. 1 (1947), for the requisite link to state action is misplaced. In *Shelley*, this Court held that court enforcement of a private, racially restrictive covenant constituted state action. *Id.* at 20. This case is different. In *Shelley*, the property owners asked the court to order a seller to comply with a racially restrictive covenant. In this case, Potlatch has not asked the court to order anyone to do anything; instead, it is merely defending a lawsuit. In *Shelley*, the discrimination could not be enforced absent court assistance. Here, no court assistance is necessary for Potlatch to implement the terms of the Retirement Plan. If this case involves state action merely because Petitioner filed a lawsuit, then every contract upon which suit is filed involves state action and is subject to constitutional review.

VII.

THE DISTINCTION MADE BY THE RETIREMENT PLAN IS RATIONAL.

Even if the Equal Protection Clause does apply to the Retirement Plan, the Plan's distinction between married and unmarried workers is not unconstitutional.

The Retirement Plan's marriage-based classification is not based on race, national origin, legitimacy or gender. Furthermore, there is no "fundamental right" for one's estate to receive money from a retirement plan following death. The Retirement Plan therefore would be subject to rational basis scrutiny.

As mentioned, a classification will withstand rational basis scrutiny "so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631; and *Lyng*, 485 U.S. at 370 (1988). The purpose of the Retirement Plan is to pay retirement income to Plan participants and their qualified beneficiaries at an acceptable cost. The Retirement Plan advances that goal by limiting the circumstances under which benefits are payable under the Plan.

Potlatch and the International Woodworkers Union could have negotiated a Retirement Plan which provided for payments to employees' estates even when they die before retirement and without a spouse. However, such a Plan naturally would have been much more expensive, and the additional costs would have to have been recouped through reduced benefits in other areas or a reduced hourly wage. The employees and their union instead chose the Retirement Plan in question. Their choice is rational, and there is no reason to second guess their decision.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — TEXT OF IDAHO CODE SECTIONS CITED

72-211. Exclusiveness of employee's remedy. — Subject to the provisions of section 72-223, the rights and remedies herein granted to an employee on account of an injury or occupational disease for which he is entitled to compensation under this law shall exclude all other rights and remedies of the employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or disease.

72-413. Income benefits for death. — If death results from the accident or occupational disease within four (4) years from the date of the accident, or manifestation of the occupational disease, the employer shall pay to or for the benefit of the following particular classes of dependents' weekly income benefits equal to the following percentages of the average weekly state wage as defined in section 72-409, Idaho Code. The benefits payable hereunder shall be subject to annual adjustment as provided in section 72-409(2), Idaho Code. The annual adjustment provided herein shall not apply to benefits for an injury or occupational disease resulting in death if the accident causing the injury or the manifestation of the occupational disease occurred prior to July 1, 1991.

(1) To a dependent widow or widower, if there be no dependent children, forty-five per cent (45%).

(2) To a dependent widow or widower, if there be dependent children, an additional five per cent (5%) of the average weekly state wage for each dependent child to and including a total of three (3). Such compensation to the widow or widower shall be for the use and benefit of the widow or widower and of the dependent children and the commission

may from time to time apportion such compensation between them in such a way as it deems best.

(3) If there be no dependent widow or widower, but a dependent child or children, thirty per cent (30%) of the average weekly state wage for one (1) child and ten per cent (10%) for each additional child to and including a total of three (3), to a maximum not to exceed sixty per cent (60%) of the average weekly state wage, to be divided equally among such children.

(4) To the parents, if one (1) be wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, twenty-five per cent (25%) of the average weekly state wage; if both are wholly dependent, twenty per cent (20%) of the average weekly state wage to each; if one (1) be or both are partly dependent, a proportionate amount in the discretion of the commission. The above percentages shall be paid if there be no dependent widow, widower or child. If there be a widow, widower or child, there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower and children, will not exceed a total of sixty per cent (60%) of the average state weekly wage.

(5) To the brothers, sisters, grandparents and grandchildren, if one (1) be wholly dependent upon the deceased employee at the time of his death, twenty per cent (20%) of the average state weekly wage to such dependents; if more than one be wholly dependent, thirty per cent (30%) of the average state weekly wage, divided among such dependents, share and share alike. If there be no one (1) of them wholly dependent, but one (1) or more partially dependent, ten per cent (10%) of the average state weekly wage divided among such dependents, share and

share alike. The above percentages shall be paid if there be no dependent widow, widower, child or parent. If there be a dependent widow, widower, child or parent, there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower, children and dependent parents, will not exceed a total of sixty per cent (60%) of the average weekly state wage.

The above percentages shall be paid if there be no dependent widow, widower, child or parent. If there be a dependent widow, widower, child or parent, there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower, children and dependent parents, will not exceed a total of sixty per cent (60%) of the average weekly state wage.

Payments made for and on behalf of a dependent child or children shall be made to such child's or children's natural or adoptive surviving parent for the use and benefit of the child or children, if such child or children reside with such parent, notwithstanding the remarriage of such parent; provided, however, if the care and the custody of such child or children has been awarded by a court of competent jurisdiction of this state or any other state to a person or persons other than the child's or children's natural adoptive parent, then such payments shall be made to that person or those persons so awarded care and custody for the use and benefit of the child or children. Whenever the commission deems it necessary, it may direct any payments made hereunder to be made under such terms and conditions as it deems necessary.

Appendix A

72-420. Compensation to state when dependency not claimed or proved. — In case no claim for compensation is made by a dependent of a deceased employee and filed with the commission within one year (1) year after the death, or in case a claim is made and filed within such year and no dependency proven, the employer shall pay into the state treasury the sum of ten thousand dollars ($10,000) to be deposited in the industrial special indemnity account.

72-432. Medical services, appliances and supplies — Reports. — (1) The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

72-436. Burial expenses. — If death results from the injury within four (4) years, the employer shall pay to the person entitled to compensation, or if there is none then to the personal representative of the deceased employee, the actual amount of burial expenses as defined in section 72-102(3).